

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

SITE PRO-1, INC., )  
Plaintiff, ) No. CV-06 6508  
v. ) JUDGE GLASSER  
BETTER METAL, LLC, ) MAGISTRATE JUDGE REYES, JR.  
Defendant. ) JURY DEMAND

**NOTICE OF SUPPLEMENTAL AUTHORITY**

Better Metal, LLC (“Better Metal”), through counsel, respectfully submits this Notice of Supplemental Authority in support of its Motion to Dismiss Pursuant to Rule 12(b)(6).

Since the submission of briefs on the defendant’s Motion to Dismiss, yet another district court in the Second Circuit has held that the mere purchase of a “keyword search” term does not constitute a use in commerce for purposes of the Lanham Act. In *Hamzik v. Zale Corporation/Delaware*, 2007 WL 1174863 (N.D.N.Y. April 19, 2007) (copy attached), Senior Judge McAvoy observed that

Case law makes it clear that merely displaying alternative products in response to a computer search on a trademark is not a Lanham Act use. *See 1-800 Contacts*, 414 F.3d 400, 409-411 (2d Cir. 2005); *Rescuecom Corp. v. Google, Inc.*, 456 F.Supp.2d 393 (N.D.N.Y. 2006); *Merck & Co. v. Mediplan Health Consulting, Inc.*, 425 F.Supp.2d 402, 415-16 (S.D.N.Y. 2006).

*Hamzik*, 2007 WL 1174863, at \* 3. Although Judge McAvoy found that in the limited instance where a defendant purchases a search that returns a result specifically incorporating the plaintiff’s trademark (*i.e.*, in a source-identifying fashion), the plaintiff may state a claim under the Lanham Act, such is not present in this case. Here, Plaintiff has not alleged that Defendant has used the subject mark in any source-identifying manner. Indeed, Exhibit B to the Complaint, a printout of a Yahoo! search for Plaintiff’s mark, demonstrates that the sponsored link to

Defendants' website does not incorporate Plaintiff's mark at all. Thus, *Hamzik*, like *1-800 Contacts*, *Merck I*, *Merck II*, and *Rescuecom* before it, fully supports dismissal of this action.

Respectfully submitted,

/s/ Jonathan D. Rose  
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#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing is being forwarded via ECF, to:

John F. Gallagher, III, Esq.  
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on this the 27<sup>th</sup> day of March, 2007.

s/ Jonathan D. Rose